

HON. MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

T-Scan CORPORATION, a Washington
Corporation,

Plaintiffs,

vs.

BPA TECHNOLOGIES, INC., et al.,

Defendants.

Case No.: 2:10-cv-0470

PLAINTIFF'S OPPOSITION TO
DEFENDANT BPA'S MOTION FOR
SUMMARY JUDGMENT

NOTED ON CALENDAR
MARCH 25, 2011

I. INTRODUCTION

Plaintiff T-Scan Corporation ("T-Scan") has sued Defendants BPA Technologies, Inc. ("BPA") and Alfresco Software Americas, Inc. ("Alfresco") for Fraud in the Inducement of a Contract, and BPA Technologies, Inc. only for two counts of Breach of Contract, arising from business transactions among the parties.

On February 28, 2011, BPA filed its Motion for Summary Judgment ("Motion") wherein it alleges that BPA was forced to cease work on the software it claims it was developing for T-Scan's needs and that T-Scan is the cause for BPA's failure to complete the software development project that T-Scan retained BPA to perform. BPA further alleges that T-Scan's

1 claim of breach by BPA for failure of delivery of the completed software on a date certain is of no
 2 moment because, BPA asserts, there was no deadline. As shall be shown, *infra*, BPA's assertions
 3 in its motion contain significant and material omissions of fact that, when included, paint an
 4 entirely different scenario than that which BPA attempts to paint.

5 1. In early 2008, Andre Nieuwendam, T-Scan's Information Technologies Manager,,
 6 in concert with Scott Tamfer, the Chief Operating Officer of T-Scan, determined that if T-Scan
 7 created a Web-based interface to its records storage database, the enhanced service would allow its
 8 existing customers to have ready access to their records stored on T-Scan's computers, and would
 9 allow T-Scan to attract new customers to subscribe to T-Scan's offerings. *Declaration of Andre*
 10 *Nieuwendam in Support of Plaintiff's Opposition to Defendant BPA's Motion for Summary*
 11 *Judgment* ("Nieuwendam Decl.") at ¶ 3.

12 2. In furtherance of seeking a solution for their needs, Andre J. Nieuwendam began to
 13 research software solutions that would enable T-Scan to meet its needs to make this offering. *Id.* at
 14 ¶ 4. Mr. Nieuwendam reviewed several possible solutions, and ultimately determined that the
 15 content management system offered by Alfresco Software Americas, Inc. ("Alfresco") would
 16 meet most, if not all, of T-Scan's needs. *Id.* at ¶ 5. Mr. Nieuwendam contacted Alfresco and
 17 described T-Scan's needs to them. *Id.* at ¶ 6. Alfresco indicated that, while their software
 18 would meet most of T-Scan's needs, some modifications to their software would be required.
 19 *Id.* at ¶ 7. Alfresco referred Mr. Nieuwendam to BPA Technologies, Inc. indicating that BPA
 20 was "System Integrator" for Alfresco's software and had earned the distinction of being a Gold
 21 Partner System Integrator. *Id.* at ¶ 8.

22 Mr. Nieuwendam visited the Web site located at <<http://www.alfresco.com>> to see if
 23 he could learn more about BPA's expertise in Alfresco. *Id.* at ¶ 9. I looked for, and found,
 24 references to BPA in the Alfresco System Integrators area. *Id.* at ¶¶ 10 – 18. Of particular
 25 note, the Alfresco Web site indicates that "[a]ll Systems Integrators have trained and certified
 26 Alfresco consultants on staff." *Id.* at ¶ 16. The Systems Integrators page shows BPA to be an

1 Alfresco System Integrator partner. *Id.* at 17. After being referred to BPA by Alfresco and
 2 reading the information on the Alfresco Web site related to BPA, Mr. Nieuwendam contacted
 3 BPA to ascertain whether they could make the enhancements to the CMS that T-Scan required.
 4 When speaking to the BPA sales representative, Mr. Nieuwendam was told by him that BPA is
 5 a Gold Partner with Alfresco and was qualified to make the changes to the CMS that T-Scan
 6 required. *Id.* at ¶¶ 19 - 20. Recalling that “[a]ll System Integrators have trained and certified
 7 Alfresco consultants on staff,” Mr. Nieuwendam concluded that BPA, being a System
 8 Integrator for Alfresco, also had a “trained and certified Alfresco consultant on staff.” *Id.* at
 9 ¶ 21. And, based upon his years of experience in Information Technology and programming,
 10 Mr. Nieuwendam well understood the significance of the representation that, as being an
 11 Alfresco partner, BPA was making a claim to technical expertise. *Id.* at ¶¶ 22 - 23. Mr.
 12 Nieuwendam relied heavily on the representations when considering and acquiring the
 13 Alfresco software and when retaining BPA to make the enhancements. It was not until much
 14 later, and only after BPA failed to deliver the goods as promised, the Mr. Nieuwendam
 15 discovered that BPA did *not* have a trained and certified Alfresco consultant on staff at any
 16 time during the interactions between T-Scan and BPA. *Id.* at ¶¶ 24 - 25.

17 Sometime around September 2008, BPA notified T-Scan that T-Scan’s needs could not
 18 be fully implemented using the CMS and, upon discovering that T-Scan already was a licensee
 19 of the software product “Liferay Portal,” BPA informed T-Scan that the functionality it desired
 20 could be implemented using Liferay Portal. *Id.* at ¶ 26. It was only after T-Scan had dismissed
 21 BPA that an Alfresco engineer reviewed T-Scan’s needs and informed T-Scan that the
 22 functionality it desired, and which BPA had informed T-Scan could not be implemented in the
 23 CMS, could indeed have been implemented in the CMS. *Id.* at ¶ 27. After T-Scan had already
 24 paid Alfresco an amount in excess of \$ 60,000, T-Scan was informed that the support T-Scan
 25 had purchased from Alfresco permitted BPA to consult with Alfresco at no cost to BPA
 26 regarding T-Scan’s needs and, if used, would have given BPA programmers the knowledge

1 and training they could have used to implement T-Scan's needs wholly within the Alfresco
2 CMS. *Id.* at ¶¶ 28 – 30. After terminating the relationship with BPA, an Alfresco engineer,
3 Richard McKnight, reviewed the work that BPA allegedly had performed and discovered that
4 BPA had actually done very little work on modifying the Alfresco CMS. *Id.* at ¶ 31. Mr.
5 McKnight also informed T-Scan that the functionality T-Scan desired and that BPA had stated
6 could not be implemented in the Alfresco CMS, *could* have been implemented in the Alfresco
7 CMS. *Id.* at ¶ 32.

8 In an email dated November 6, 2008, BPA's employee, Vasu Maganti, informed
9 T-Scan that the work that BPA had done as of that date, and for which T-Scan had paid BPA
10 an amount in excess of \$48,600, contained nothing that could be salvaged. *Id.* at ¶ 33. This
11 information came as no surprise to T-Scan as, from the time that BPA delivered the first
12 version of the software to T-Scan, T-Scan employees spent an average of 2 – 3 hours each day
13 testing the software and detecting deficiencies. On no occasion did T-Scan receive a version of
14 the BPA software that functioned properly and many times, the software did not function at all.
15 Mr. Nieuwendam concluded that BPA was not testing its own software prior to delivering it to
16 T-Scan. Rather, BPA submitted the software to T-Scan and T-Scan employees to suffer the
17 expense and time of testing the software. *Id.* at ¶¶ 34 – 36.

18 In BPA's May 7, 2008 version of its proposal to T-Scan, BPA indicated that the
19 software development to meet T-Scan's needs would require six (6) weeks to complete from
20 the inception of development. Nieuwendam Decl. at ¶ 37, Exhibit "A" to the Complaint at 7.

21 In BPA's May 14, 2008 version of its proposal to T-Scan, BPA indicated that the
22 software development to meet T-Scan's needs would require eight (8) weeks to complete from
23 the inception of development. Nieuwendam Decl. at ¶ 38, Exhibit "B" to the Complaint at 7.

24 In BPA's May 29, 2008 version of its proposal to T-Scan, BPA indicated that the
25 software development to meet T-Scan's needs would require eight (8) weeks to complete from
26 the inception of development. Nieuwendam Decl. at ¶ 39, Exhibit "C" to the Complaint at 7.

1 In BPA's October 10, 2008 version of its proposal to T-Scan, BPA indicated that the
 2 software development to meet T-Scan's needs would require twenty-two (22) weeks to
 3 complete from the inception of development. Nieuwendam Decl. at ¶ 40, Exhibit "D" to the
 4 Complaint at 13. In that version of the proposal, BPA claims that the first fifteen (15) weeks of
 5 development had already been completed. As such, the very latest that BPA could have begun
 6 modifications to the CMS would have been June 25, 2008. Using BPA's own schedule, the
 7 project would have to be completed no later than November 17, 2008. Nieuwendam Decl. at
 8 ¶ 41.

9 In BPA's November 28, 2008 version of its proposal (the "Liferay" version), BPA now
 10 claims that only the first five (5) weeks of development had already been completed. As such,
 11 the very latest that BPA could have begun modifications to the CMS would have been October
 12 29, 2008. Using BPA's own schedule, the project would have to be completed no later than
 13 February 6, 2009. *Id.* at ¶ 42.

14 In BPA's December 30, 2008 and final version of its proposal, BPA unambiguously
 15 states that all development will be completed by April 10, 2009. T-Scan blocked all access to
 16 its computers on December 15, 2009, more than eight full months after the deadline set by
 17 BPA for project completion. *Id.* at ¶ 43. As of December 15, 2009, BPA had failed to deliver
 18 the goods as promised.

19 BPA represented to Mr. Nieuwendam that it was a "Gold Partner" System Integrator in
 20 the Alfresco Partner Network. *Id.* at ¶ 45. This representation was material in Mr.
 21 Nieuwendam's investigation of what Alfresco represents a Gold Partner System Integrator to
 22 be and in his subsequent recommendation to T-Scan management to retain the services of
 23 BPA. Of particular importance to Mr. Nieuwendam in making that recommendation and
 24 subsequent decision was the fact that Alfresco requires its Gold Partner System Integrator to
 25 have a trained and certified Alfresco consultant on staff. *Id.* at ¶ 46. However, as Mr.

1 Nieuwendam discovered, BPA did not at any time relevant to the project have such a trained
2 and certified Alfresco consultant on its staff. *Id.* at ¶ 47.

3 At the time BPA made the representation to Mr. Nieuwendam that it was an Alfresco
4 Gold Partner, BPA knew that it did not have a trained and certified Alfresco consultant on its
5 staff. BPA intended that T-Scan believe that BPA was an Alfresco Gold Partner System
6 Integrator and all that the designation implied, including the implicit representation that BPA
7 had a trained and certified Alfresco consultant on its staff. When BPA made its representations
8 to T-Scan that BPA was a Gold Partner System Integrator, BPA knew that T-Scan did not have
9 any knowledge of the fact that BPA did not have a trained and certified Alfresco consultant on
10 its staff, as is required by Alfresco of its partners. T-Scan relied upon the truth that BPA was a
11 Gold Partner System Integrator and the implicit representations of all that is required to be an
12 Alfresco Gold Partner System Integrator, including the implicit representation that BPA had a
13 trained and certified Alfresco consultant on its staff. T-Scan was damaged by BPA's
14 representations because T-Scan never received BPA-modified software that functioned per T-
15 Scan's requirements, T-Scan paid in excess of \$48,600 to BPA and more than \$60,000 to
16 Alfresco for which T-Scan received no benefit. *Id.* at ¶¶ 48 – 52.

17 As of December 15, 2009, BPA had utterly failed to deliver the goods to T-Scan as
18 promised and failed to come even close to the self-imposed deadline of April 10, 2009. *Id.* at
19 ¶ 53.

20 Plaintiff T-Scan now offers this opposition to BPA's motion as follows

21 **II. OPPOSITION**

22 In its Motion, BPA observes that when Mr. Tamfer was "asked whether Alfresco had
23 made any *specific statements about BPA* which influenced T-Scan's decision to work with
24 BPA Tamfer twice stated that he did not recall any such statements." Motion at 3:3-5. As Mr.
25 Nieuwendam testifies in his declaration, it was he who was the Information Technologies
26 Manager and it was he who initially contacted Alfresco and BPA. Whether Mr. Tamfer ever

1 received any such statements is of no moment. Whether Mr. Nieuwendam ever received any
2 such specific statements might be relevant because it was Mr. Nieuwendam who had the initial
3 and regular contact with Alfresco and BPA. However, for reasons unfathomable, BPA elected
4 to not depose Mr. Nieuwendam. If it had deposed Mr. Nieuwendam, BPA might well have
5 received a very different answer. But, BPA did not, T-Scan submits, because BPA got the
6 answer it wanted and which fuels its innuendo.

7 BPA goes on at length about Mr. Tamfer's lack of knowledge about the meaning or
8 import of the statement on the Alfresco's Web site "pertaining to certified and trained Alfresco
9 consultants." Motion at 3:6 – 16. Again, Mr. Tamfer, who is the Chief Operating Officer of
10 T-Scan is not presumed to know answers to technical questions about computer programs and
11 technical consultants. It was Mr. Nieuwendam's responsibility to know such things and, based
12 upon his numerous years of experience with Information Technologies and programming, he
13 quite likely would have provided BPA with technical answers to their technical questions. But,
14 again, BPA elected to not depose Mr. Nieuwendam, so we will never know how he would have
15 responded.

16 BPA alleges that it "submits evidence that T-Scan never asked BPA whether it had any
17 trained or certified consultants on staff, and that BPA never discussed the subject with T-Scan.
18 As Mr. Nieuwendam testifies, Alfresco recommended BPA to T-Scan, and Alfresco's Web site
19 unambiguously states, "All System Integrators have trained Alfresco consultants on staff."
20 Based upon these representations, T-Scan had no reason to question Alfresco's veracity and,
21 apparently, Alfresco had no obvious reason to believe that a company Alfresco touts as their
22 partner was not in compliance with Alfresco requirements. However, it *is* clear why BPA
23 "never discussed the subject with T-Scan." BPA did not want to draw attention to the fact that
24 it had no trained and certified Alfresco consultant on its staff for fear of losing the business.

25 BPA goes on to point out that Mr. Tamfer erroneously testified that at the time of
26 T-Scan's initial contact with BPA, BPA's Web site did not contain the information that BPA

1 was an Alfresco Gold Partner System Integrator. However, BPA attempts a feint move of no
 2 significance because whether that information was on BPA's Web site or not is irrelevant.
 3 Alfresco had BPA listed on *its* Web site as a Gold Partner System Integrator, stated that "[a]ll
 4 System Integrators have a trained and certified Alfresco consultant on its staff" and it was
 5 Alfresco that referred T-Scan to BPA. BPA disingenuously implies that simply because BPA
 6 did not list Alfresco on the BPA Web site that such omission relieves BPA of the Alfresco
 7 requirement to have a trained and certified Alfresco consultant on its staff.

8 In its Motion, BPA alleges that T-Scan "admitted that defining the scope was
 9 difficult..." and further stated that it "probably had not done its best to facilitate the scoping
 10 process...". Motion at 6:14 – 17. T-Scan has reviewed the email that BPA contends contains
 11 this admission. However, nothing in the email supports BPA's contention. BPA carefully
 12 slices out a sliver of the message that could be interpreted to support their contention.
 13 However, the full paragraph of the email reads,

14 Thank you for your phone call. I personally have the upmost confidence that BPA
 15 will do an excellent job in the delivery of this system, and that we will be doing a
 16 lot of work together in the future. Please tell Harsha that we are not taking this
 17 upon him personally, Scott has a commitment to his clients to have this out and
 18 done well given the software issues we have had in the past. As a developer I
 19 understand that it is difficult to absorb a company's business model in a short
 20 period of time, and had it been my project and my choice, I would have
 21 orchestrated it differently. In terms of the Liferay Integration, I would like to
 22 make sure we give you a detailed insight to the custom Portlets and the mail
 system, as these are the most important aspect of this. We will be preparing a
 design document with the flow from Alfresco to the Portlets that we would like to
 see integrated. I will be sitting with Yaso to make sure there is a clear
 understanding regarding these and then provide Harsha and Rama with very
 accurate descriptions as to what Scott wants to see.

23 Here, Mr. Nieuwendam is criticizing the manner in which Harsha Rachapalli, a BPA
 24 employee, handled the project and, unlike BPA's contention that T-Scan's "defining the scope
 25 was difficult," Mr. Nieuwendam merely observed that "it is difficult to *absorb* a company's
 26 business model in a short period of time..." (emphasis added). BPA significantly misstates the

1 substance of Mr. Nieuwendam's email message and twists it to say that Mr. Nieuwendam is
 2 admitting to T-Scan shortcomings when the message makes no such admissions and is clearly
 3 being critical of how BPA handled the project. As Mr. Nieuwendam stated, "[H]ad it been my
 4 project [and not BPA's], I would have orchestrated it differently."

5 BPA contends that the December 30, 2008 (dubbed by BPA as the "Liferay Proposal")
 6 "did not contain a deadline for completion of the project, only estimated timeframes for the
 7 various portions of the development." Motion at 8:3 – 4. However, contrary to BPA's
 8 assertions now, the December 30, 2008 version of the proposal contains specific dates; dates
 9 set by BPA. Exhibit G to the Complaint at 50. Moreover, there are *specific* dates printed in
 10 the document ("22nd December, 2008", "3rd February, 2009", "10 April, 2009"), not "estimated
 11 timeframes" as BPA now avers.

12 In its lengthy recitation of the history of the project, BPA makes numerous averments
 13 regarding the content of exhibits. Similar to BPA's misstating the substance of its own
 14 document alleging that it does not contain deadline dates, BPA alleges in its Motion at 10 – 13,
 15 "Because T-Scan was an Alfresco customer, and therefore had more leverage, the parties
 16 agreed that T-Scan would engage Alfresco to provide a solution." In support of this allegation,
 17 BPA refers the reader to an email thread dated June 24, 2009 (Exhibit F to the Suryadevara
 18 Declaration, Dkt. No. 40). However, nothing in the exhibit refers to BPA and T-Scan agreeing
 19 to T-Scan applying leverage to Alfresco. Rather, a unilateral statement by the BPA employee
 20 "Murali" states "Your team will have to work directly with Alfresco support or engineering to
 21 resolve the site creation issue. They have not been able to provide us with a solution." BPA
 22 paints the picture that all was harmonious between BPA and T-Scan. It was not. Over a period
 23 spanning in excess of two (2) years, BPA had not even delivered on the original scope of
 24 functionality stated in the original version of the proposal dated May 7, 2008.

On December 15, 2009, and over eight (8) months *after* BPA's "Development Complete" date of April 10, 2009, T-Scan decided to staunch the blood-flow of money being paid to BPA and terminated BPA's access to T-Scan computers.

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, the record shows that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)). Once the moving party has satisfied its burden, it is entitled to summary judgment if the nonmoving party fails to designate, by affidavits, depositions, answers to interrogatories, or admissions on file, "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "The mere existence of a scintilla of evidence in support of the nonmoving party's position is not sufficient." *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 2003). "[S]ummary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable jury could return a verdict in its favor." *Id.* at 1221.

B. Fraud in the Inducement of the Contract (Claim I)

BPA alleges that "[to] prevail on its fraud in the inducement claim, T-Scan must establish each of the elements of fraud with 'clear, cogent and convincing evidence' citing to *Sigman v. Stevens-Norton, Inc.*, 70 Wn.2d 915, 920, 4256 P.2d 891 (1967). Motion at 12:1 –

3. BPA alleges that the nine elements of fraud are:

- (1) a representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that it should be acted on by the person to whom it is made; (6) the recipient's ignorance of its falsity; (7) the recipient's reliance on the truth of the representation; (8) the recipient's right to rely upon it; and (9) consequent damages.

citing to *Adams v. King County*, 164 Wn.2d 640, 662, 192 P.3d 891, 902 (2008) as its

authority. BPA goes on arguing that "[f]ailure to prove any one of the nine elements is fatal to

1 recovery” citing to *Puget Sound Nat'l Bank v. McMahon*, 53 Wn.2d 51, 54, 330 P.2d 559, 561
 2 (1958). BPA finishes, [t]o be clear, cogent and convincing, the evidence must be greater than
 3 a mere preponderance” citing to *Markov v. ABC Transfer & Storage Co.*, 76 Wn.2d 388, 395,
 4 457 P.2d 535, 539 (1969).

5 Addressing each element *in seriatim*, T-Scan disputes BPA’s assertion that “[t]here is
 6 no factual dispute about whether BPA made a false representation to T-Scan regarding BPA’s
 7 employment of a trained and certified Alfresco consultant.” Motion at 12:16 – 17.

8 1. A representation of an existing fact: Mr. Nieuwendam testifies that when BPA
 9 made the statement that it was a Gold Partner System Integrator to him, BPA knew it did not
 10 have a trained and certified Alfresco consultant in its employ.

11 2. Its materiality: Mr. Nieuwendam testifies that that the designation as a “Gold
 12 Partner” and all that it implies was material to his investigation of what Alfresco represents a
 13 Gold Partner System Integrator to be. Further, knowing that Alfresco requires that its Gold
 14 Partner System Integrators have a trained and certified Alfresco consultant on its staff was
 15 material to Mr. Nieuwendam’s decision to recommend to his management that T-Scan retain
 16 the services of BPA. By holding itself out as a Gold Partner System Integrator, BPA implicitly
 17 represented that it had a trained and certified Alfresco consultant on its staff.

18 3. Its falsity: Mr. Nieuwendam testifies that it wasn’t until sometime later that Mr.
 19 Nieuwendam discovered that BPA did *not* have a trained and certified Alfresco consultant on
 20 its staff.

21 4. The speaker’s knowledge of its falsity: Mr. Nieuwendam testifies that at the
 22 time BPA made the representation that it was a Gold Partner System Integrator, it knew that it
 23 did not have a trained and certified Alfresco consultant on its staff.

24 5. The speaker’s intent that it should be acted on by the person to whom it is
 25 made: Mr. Nieuwendam testifies that BPA intended that T-SCAN believe that BPA was an
 26 Alfresco Gold Partner System Integrator and all that the designation implied, including the

1 implicit representation that BPA had a trained and certified Alfresco consultant on its staff, so
2 as to get T-Scan's business.

3 6. The recipient's ignorance of its falsity: Mr. Nieuwendam testifies that when
4 BPA made its representations to T-SCAN that BPA was a Gold Partner System Integrator,
5 BPA knew that T-SCAN did not have any knowledge of the fact that BPA did not have a
6 trained and certified Alfresco consultant on its staff, as is required by Alfresco of its partners.

7 7. The recipient's reliance on the truth of the representation: Mr. Nieuwendam
8 testifies that T-SCAN relied upon the truth that BPA was a Gold Partner System Integrator and
9 the implicit representations of all that is required to be an Alfresco Gold Partner System
10 Integrator, including the implicit representation that BPA had a trained and certified Alfresco
11 consultant on its staff.

12 8. The recipient's right to rely on upon it: Because Alfresco represented that BPA
13 was one of its Gold Partners, and because BPA represented that it was a Gold Partner System
14 Integrator of Alfresco, and because all system integrators must have a trained and certified
15 Alfresco consultant on its staff, T-Scan reasonably concluded that BPA had a trained and
16 certified Alfresco consultant on its staff. As such, T-Scan had the right to rely on BPA's
17 statements and representations.

18 9. Consequent Damages: T-Scan's reliance to its detriment on BPA's
19 representations caused T-Scan to pay BPA in excess of \$46,600, and to pay Alfresco more
20 than \$60,000 for which T-Scan received no benefit.

21 All these evidentiary facts could result in a jury finding in T-Scan's favor that BPA
22 committed fraud in the inducement of the contract between BPA and T-Scan. However, As
23 such, Claim I is not subject to being dismissed on summary judgment since BPA and T-Scan
24 dispute the material facts of T-Scan's claim and must be put before a trier of fact.

C. T-Scan's Understanding of the Meaning or Importance of the Statement on Alfresco's Web site

BPA represents that because Mr. Tamfer, the Chief Operation Officer of T-Scan did not have an understanding of the meaning or importance of the statement on Alfresco's Web site that "[a]ll System Integrators have a trained and certified Alfresco consultant on its staff," that *all* of T-Scan did not understand the meaning or importance of the statement. BPA misleads itself just as it attempts to mislead this Honorable Court. Mr. Nieuwendam testifies that he understands the meaning and importance of the statement, and Mr. Nieuwendam was the Information Systems Manager and a programmer and is qualified to assess the statement and understand its meaning and importance. His understanding of the meaning and importance of the statement was material to him when considering whether to retain BPA.

D. Washington's Independent Duty Doctrine

BPA alleges that Washington's independent duty doctrine precludes T-Scan from recovering on its claim. Motion at 14:6 – 8. As BPA accurately observes, the Washington Supreme Court stated in *Affiliated FM Ins. Co.*: "[i]f aggrieved parties to a contract could bring tort claims whenever a contract dispute arose, certainty and predictability in allocating risk would decrease and impede future business activity." *Affiliated FM Ins. Co.*, 470 Wn.2d at 451 – 52, 243 P.3d at 527. However, BPA misapprehends the significance of the Court's ruling in that T-Scan's tort claim is not a contract dispute. Rather, it was a tortious act that was committed prior to the parties entering into the contract. As such, the Washington independent duty doctrine does not apply in this case.

E. T-Scan's alleged preventing BPA from performing its obligations

BPA contends that T-Scan prevented them, from performing under the contract by cutting off access to the T-Scan computers. Motion at 15:19. BPA goes on to allege that "there can be no dispute that T-Scan prevented BPA from completing its development work." Motion at 16:9 – 10. However, BPA doesn't admit that it did the development work on their

own computers and uploaded their software to T-Scan's computer for the purpose of T-Scan testing the software. T-Scan vigorously disputes BPA's alleged "facts" regarding BPA's inability to complete software development. They simply fly in the face of representations by both parties that BPA was doing its development on its own computers found in BPA's exhibits to the declarations of Vijji Suryadevara and Vasu Maganti.

F. BPA missing its deadlines

BPA insists that there was no deadline in the Liferay version of the proposal dated December 30, 2008. BPA knows full well that it set deadlines for completion of the project with a deadline for completion of the project by April 10, 2009. Those deadlines are clearly stated on page 50 of the proposal and BPA tied them to specific milestones. BPA's citations to case law that it deems relevant are of no moment. The plain language in the December 30, 2008 proposal has dates that BPA set and which were accepted by T-Scan.

When BPA had failed to deliver the goods promised a full eight months after the expiration of the April 10 deadline, T-Scan terminated BPA's access to T-Scan computers to limit its damages.

IV. CONCLUSION

Having shown that a significant number of material facts are in dispute, and the significant materiality of those facts, this case cannot be, and should not be dismissed on Summary Judgment. In Mr. Nieuwendam's testimony, he provides specific facts showing that there are genuine issues of material fact that must be put before a trier of fact in order to ascertain the rights and liabilities of the parties.

A reasonable jury could well return a verdict in favor of T-Scan based upon T-Scan's evidence and testimony of Mr. Nieuwendam. Consequently, BPA is not entitled to judgment as a matter of law and T-Scan respectfully submits that BPA's motion must be dismissed in its entirety.

1 DATED this 21st day of March 2011.

2 Respectfully submitted,

3 s/ Robert S. Apgood

4 Robert S. Apgood, WSBA 31023

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